IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

FRIDAY, THE 15TH DECEMBER 2006 / 24TH AGRAHAYANA 1928

Crl.MC.No. 637 of 2005()

CC.334/2004 of JUDL.MAGISTRATE OF FIRST CLASS COURT, TALIPARAMBA

.....

PETITIONER:

IBRAHIM HAJI, S/O.MUHAMMED,
AGED 50 YEARS, POOMANGALORAKATHU HOUSE,
ALAKODE AMSOM, RAYAROM DESOM.

BY ADV. SRI.BLAZE K.JOSE

RESPONDENTS:

THE STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
REPRESENTING THE SUB INSPECTOR OF POLICE,
ALAKODE POLICE STATION.

ADDL. R2: THE VILLAGE OFFICER, ALAKODE VILLAGE,
THALIPARAMBA, KANNUR DISTRICT.

(ADDL.R2 IMPLEADED AS PER ORDER DATED 4-7-06 IN CRL.M.A. 1708/2006)

BY PUBLIC PROSECUTOR SRI PUZHAKKARA MUHAMMED.

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 17-8-2006, THE COURT ON 15-12-2006 PASSED THE FOLLOWING:

K.R. UDAYABHANU, J.

CRL.M.C.NO.637 of 2005-D

DATED THIS THE 15TH DAY OF DECEMBER 2006

ORDER

The petitioner, who is the accused in C.C.No.334/2004 in the file of the Judicial First Class Magistrate Court, Taliparamba, has sought for getting quashed the proceedings initiated against him for the offence under Section 379 I.P.C. The theft alleged is that he cut and removed trees worth Rs.15,000/- from the property extending 1 acre and 75 cents in R.S.No.17/1A which was attached by the Tahsildar, Taliparamba and of which he is the owner. The attachment was effected in pursuance of the execution of M.C.87/91 filed by his wife under Section 125 Cr.P.C. and in execution of the order that he shall pay at the rate of Rs.500/- to his four minor children from the date of the petition, i.e. from 1997. The arrears due amounted to Rs.39,000/-. That attachment was effected in December 2002 as per the order of the Tahsildar under the Revenue Recovery Act. Unaware of the order of attachment, the petitioner had agreed to sell some of the standing timber in the said property

to one Mathukutty in December 2002. The above person cut and removed certain Maruthu trees from the property. Thereupon the wife of the petitioner filed a complaint to the Sub Inspector of Police alleging that he had cut and removed the trees worth approximately Rs.15,000/- from the property attached. Hence, the Sub Inspector has registered a crime against the petitioner as Crime No.185/2003 under Sections 447 and 379 I.P.C.on the ground that the petitioner had trespassed into the property attached by the Tahsildar and has committed theft of timber worth Rs.15,000/-. The petitioner was arrested and remanded to judicial custody and thereafter released on bail. The trees cut down was recovered and has been kept in the custody of the court as thondi articles in the police station. Subsequently the petitioner remitted the entire maintenance arrears and the family Court, Kannur as per order dated 19-4-2004 has recalled the distress warrant. The Tahsildar has thereafter issued order under Section 42 of the Revenue Recovery Act withdrawing the attachment vide order dated 20-4-2004.

2. It is submitted that the petitioner is the owner and in

possession of the property for which demand notice under Section 44 has been issued and order under attachment is passed under Section 36 of the Revenue Recovery Act. The demand notice or attachment effected would not create any charge or interest in the land to the person for whom the attachment is effected or to the Government. It has only the effect of an attachment under the provisions of the Code of Civil Procedure. The only consequence is under Section 44 of the Revenue Recovery Act that any engagement or transfer entered into by the defaulter with any one after the service of the written demand on him shall not be binding upon the Government. Moreover Section 85 of the Revenue Recovery Act is self contained for punishing any violation for the fraudulent conveyancing of the property attached. Further more, the offence of theft consists in the dishonest taking of any movable property out of the possession of the person without his consent in order to cause wrongful gain to himself and wrongful loss to the other. The petitioner has sought for setting aside the proceedings as well as for getting released the wooden logs kept in custody as thondi articles. Counsel has relied on the decision

reported in **Chandrasekharan Pillai v. The Popular Bank ltd.[1967 I.L.R.(ker.)661]** wherein this Court has elucidated the implications of an order of attachment under the Revenue Recovery Act. It has been held that here is nothing in the Travancore-Cochin Revenue Recovery Act to show that an attachment effected thereunder creates any interest in the land. All that is done by Section 26 is to give notice that, unless the arrear be paid within the date mentioned, the land will be brought to sale for recovery of the arrear. It would thus appear that an attachment under the Revenue Recovery Act no more creates a charge or other interest in the land than an attachment under the provisions of the Civil Procedure Code.

3. In **Thiru Venkita Reddiar v. Noordeen[1997 K.L.T.877]** this Court has explained concept and consequences of attachment. It has been held in the above cited decision relying on precedents that an attachment is an order prohibiting and restraining the defendant from transferring or charging the attached property by sale, gift or otherwise and all persons from so receiving it and S.64 of the Code provides that private transfer or delivery of property attached shall be void against all

claims enforceable under the attachment. Its effect therefore is only to prevent alienation and not to confer title by way of charge or otherwise on the attaching decree-holder. Further it is only aimed at private alienations. It does not prevent involuntary alienations. On this aspect of the matter there is no difference between attachment in execution of a decree and an attachment before judgment. Order XXXVIII, rule 10, CPC, makes this position clear. That rule provides that the attachment before judgment shall not affect the rights existing prior to the attachment of persons not parties to the suit, nor bar any person holding decree against the defendant from applying for sale of the property attached. Such being the effect of an attachment, whether before or after decree, it does not bar a court sale in execution of another decree and with the court sale the interest of the judgment-debtor passes to the auction-purchaser and there is nothing left to be sold later at the instance of another decree-holder who may have attached the property earlier. The purpose of the attachment is solely for the purpose of protecting the attaching creditor's right to bring to sale in execution the right, title and interest in the attached

property of the judgment debtor and there is no reason for holding that it continued to affect the attached property in anyway when the attached property no longer continues to be the property of the judgment-debtor. The auction-purchaser takes the property free from attachment. The consequence no doubt to an earlier attaching creditor is very serious, but his rights are sufficiently safeguarded in such a situation by entitling him to a rateable distribution of the proceeds of the sale. If this were not so complications will arise between an earlier attaching creditor and a subsequent attaching creditor. If the sale was under a private alienation with the earlier sale there is nothing left with the transferor to transfer subsequently to another. In the same manner the prior sale in pursuance of an attachment will prevail over a subsequent sale even if the latter sale was in pursuance of an earlier attachment. With the court sale all attachments subsisting on the property will fall to the ground.

4. The Full Bench of the Supreme Court in **Chandi Kumar Das Karmarkar and another v.Abasidhar Roy [(1964)1 K.L.R.123** has expatiated as to the concept of dishonest taking away of the movable property without consent, which is

the essential ingredient of theft under Section 379 I.P.C. The Court has held :

> The offence of theft consists in the dishonest taking of any movable property out of the possession of another without his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as animus furandi and without it the offence of theft is not complete.
>
> xx xx xx xx xx
>
> The ordinary rule that mens rea may exist even with an honest ignorance of law is sometimes not sufficient for theft. A claim of right in good faith, if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. It is settled law that where a bona fide claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft, unless there be not only no legal right but no appearance or colour

> of a legal right. By the expression "colour of a legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim but a bona fide claim, however weak. The law is correctly stated in 2 East P.C.659 thus: "If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all the Court will direct an acquittal", and referred to Hale P.C.509 "The best evidence is that the goods were taken quite openly". The law stated by East and Hale has always been the law on the subject of theft in India and numerous cases decided by Indian Courts are to be found in which these principles have been applied. Wherein the taking of movable property is in the assertion of a bona fide claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft.

In the circumstances in the instant case the attachment under the Revenue Recovery Act would not result in creating any interest in the property nor depriving the owner of the right over the property. The alleged action on the part of the owner would

not attract the definition of theft in the I.P.C. On facts, I find that Section 85 of the Revenue Recovery Act also would not be attracted. Hence, the proceedings pending as C.C.No.334/2004 in the Court of Judicial First Class Magistrate, Taliparamba is herewith quashed. The timber kept in the custody of the court would be released to the petitioner forthwith. The Crl.M.C.is disposed of accordingly.

Sd/-

K.R.UDAYABHANU, JUDGE

ks. **TRUECOPY**

P.S.TO JUDGE